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No. 84-1856

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

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DAIRYMEN, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI PETITION

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The Government in its brief in opposition to Dairymen, Inc.'s ("DI's") certiorari petition, seeks to negate DI's entitlement to the special antitrust exemption afforded by the Capper-Volstead Act (7 U.S.C. § 291)[1] by asserting that the Act does not allow agricultural cooperatives such as DI to "suppress competition." Brief for the United States in Opposition,

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[1] The Act authorizes agricultural cooperatives to make those contracts and agreements which are "necessary" to carry out the collective "marketing" of the products of the cooperative's members.

at 7-8. However, such an assertion stands only as a resounding irrelevance.

There is no assertion by the Government that DI's contracts, limited as they were to only one year, were suppressive of competition. Indeed, the district court found that there were "sound and legitimate reasons" for such narrow gauge contracts. Petition Addendum at 59.[2] What the Government and the courts below have ignored, and what the essence of this petition addresses, is the utter failure to recognize that the Capper-Volstead Act frees agricultural cooperatives (such as DI) from the normal constraints of the antitrust laws in the cooperatives' day-to-day marketing activities. In short, cooperatives are granted far more latitude in the marketing of their members' products than are ordinary business corporations. *Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1040-45 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

Only with respect to agricultural cooperatives, do the antitrust laws immunize "necessary contracts." Thus, full supply contracts such as DI's which are reasonable may nonetheless violate Section 3 of the Clayton Act when entered into by ordinary business corporations simply because Section 3 does not countenance a rule of reason defense. *Standard Oil Co.* v. *United States*, 337 U.S. 293, 314 (1949). Conversely, however, when such reasonable contracts are entered into by agricultural cooperatives such as DI, they are entitled to the "necessary contracts" protection of the

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[2] The contracts in this case thus passed muster under Section 1 of the Sherman Act which outlaws only those contracts which unreasonably restrain trade. *Board of Trade of Chicago* v. *United States*, 246 U.S. 231, 238 (1918).

Capper-Volstead Act. Plainly, if they were not entitled to such protection, the specific antitrust exemption of the Capper-Volstead Act would be meaningless. *Kinnett Dairies, Inc.* v. *Dairymen, Inc.*, 512 F. Supp. 608, 633 (M.D. Ga. 1981), *aff'd per curiam*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984).

In the sixty-three years which have elapsed since the enactment of the Capper-Volstead Act, this Court has not addressed in any respect the "necessary contracts" provision of the statute. Given this Court's recognition that "in our national economy agriculture expresses functions and forces different from other elements in the total economic process" (*Tigner* v. *Texas*, 310 U.S. 141, 147 (1940)), the present petition affords the Court with the opportunity to provide much needed guidance in the daily activities of this country's agricultural cooperatives.

Respectfully submitted,

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September 9, 1985

**CERTIFICATE OF SERVICE**

I hereby certify on this 9th day of September, 1985, three copies of this Reply Brief were mailed, postage prepaid, to The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; to the Assistant Attorney General, Antitrust Division; and to the Chief of the Appellate Section, Antitrust Division, United States Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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